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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 670

TAYLOR JUSTICE and
STELLA JUSTICE, Appellants,

v.

UNITED STATES OF AMERICA,
ELMO H. JOHNSON, Special Agent,
Internal Revenue Service,
FIRST NATIONAL BANK OF PIKE-
VILLE, KENTUCKY,
CITIZENS BANK OF PIKEVILLE,
KENTUCKY, and
PIKEVILLE NATIONAL BANK AND
TRUST COMPANY, INC., Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 570

TAYLOR JUSTICE and
STELLA JUSTICE, - - - - - *Appellants,*

v.

UNITED STATES OF AMERICA;
GLEN B. JOHNSON, Special Agent, Internal Revenue Service;
FIRST NATIONAL BANK OF PIKEVILLE KENTUCKY;
CITIZENS BANK OF PIKEVILLE, KENTUCKY; and
PIKEVILLE NATIONAL BANK AND TRUST COMPANY, INC., - - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM.

Taylor Justice and Stella Justice, your appellants, respectfully state that they oppose the motion to affirm filed by the Solicitor General on behalf of the United States of America and Glen B. Johnson, a Special Agent of the Internal Revenue Service.

ARGUMENT.

The basis of the motion to affirm filed by the Solicitor General is that no substantial question is presented on this appeal.

We would most respectfully call to the Court's attention Pages 11 through 17 of our Jurisdictional Statement filed in this case. In addition, however, we would like to point out that the lower federal courts are having difficulty in applying recent pronouncements of this Court dealing with constitutional rights. In those situations prosecutions for tax evasion are instituted after a routine civil audit where the provisions of Title 18 U.S.C. Sections 7602, 7603 and 7604 have been utilized. In our Jurisdictional Statement we referred to the case of U. S. v. Kingry, CCH USTC Advance Sheets Par. 9262 (N. D. Fla.), M-1948 CR, Jan. 6, 1967.

Since the filing of our Jurisdictional Statement in this case, three federal courts have had occasion to speak relevant to the issues presented by this case.

Although not dealing precisely with a tax investigation, the case of U. S. of America, ex rel. Frank DeForte v. Mancusi, etc., 379 F. 2d 897 (2CCA), is the latest pronouncement of a federal court on the issue of standing as applied to the facts of this case. There the Second Circuit Court of Appeals reversed the district court for the Western District of New York's denial of a petition for writ of habeas corpus on the ground that the petitioner lacked standing to object to the introduction against him at a state trial of evidence alleged to be the fruit of an illegal search and

seizure. The court held that the petitioner, a union officer, who was convicted in a state court of conspiracy, coercion and extortion, had standing to challenge evidence introduced at trial, which consisted of various union books and records which were admittedly illegally seized by state officials from the union's office while the union officer was present. The court's decision there was bottomed, basically, on this court's pronouncement in the case of Jones v. United States, 362 U. S. 257. We do not believe that extensive quotations from this opinion is either necessary or desirable in this brief. We would take the liberty of quoting from the latter portion of the opinion in which the Second Circuit said:

> "We have already noted that it would be unwise to use this case as a vehicle for resolving all controversy in this broad area. But we recognize that in the interpretation of opinions, some of the most glaring errors have been made by mechanical and unreflective application of new or old formulations, and neglect of the differences between cases leads to unfortunate and unanticipated consequences. Mindful of this, we therefore caution that we have not concluded that every shareholder, or employee, or union member has standing to object to the unlawful seizure of his corporation's or union's books and records. And we have not held that every officer has standing to require the suppression of such materials. We do decide that the facts presented to us clearly reveal that the admittedly illegal search and seizure were 'directed' at appellant, and that his right of privacy was invaded by the unwarranted action of

the state officials. In these circumstances we can discern no legitimate reason for denying DeForte standing."

The district court for the Northern District of Illinois has applied this court's decision in Miranda v. Arizona, 384 U. S. 436, to tax payers under investigation for taxes. U. S. v. Turzynski, 268 F. Supp. 847, and in this connection see "Fifth Amendment Right to Counsel in Federal Income Tax Investigations," 19 Stan. L. Rev. 1014.

The clearest call for a pronouncement by this Court on these matters is that of the Sixth Circuit Court of Appeals in U. S. v. Maius, 378 F. 2d 716. That court said:

> "With regard to the contention that statements made by appellant to the Internal Revenue agents were improperly admitted in evidence, when the agent, who had advised him of his rights under the Fifth Amendment, did not inform him that he could have an attorney present during the interview, we find no error. Appellant was not under arrest or under duress in the legal sense of the term when he made the statements in question. A doubt may well assail us as to whether it is fair to a citizen to be summoned before the Internal Revenue agents to be informed that anything he says may be used against him, and then for the agents of the Internal Revenue Service, personifying the authority and punitive nature inherent in law enforcement, to subject a man to questioning and to extract possibly by threats, insinuations, or subtle forms of suggestive coercion, the only evidence on which he can be sent to prison, and to use this evidence to send him to prison. It

would seem, in all fairness, that before he answers such questions and thereby directly incriminates himself, he should be advised of his right to have his lawyer present. The Internal Revenue Service has lately been subjected to widespread criticism, because of trickery of some of its agents in unconstitutional invasion of a citizen's rights by the use of tapped telephone wires, or 'bugging'; and the Commissioner has repudiated and castigated such conduct. No one would believe, however, that a man would appear before government agents, and answer their questions, if he knew that the effect of his answers would be to send him straight to the penitentiary. But whether fair or not, no court has held that a man who is not advised of his right to have his attorney present when questioned by an Internal Revenue agent is thereby deprived of his constitutional rights. A citizen summoned before such federal agents has the option to refuse to answer their questions; but there are few who have the toughness of fibre and the technical knowledge of their rights, who would decline to answer questions put to them in these circumstances. *Until we are told by superior authority that a citizen's constitutional rights are imperiled by such procedure, we are constrained to hold that the evidence thereby obtained is admissible in the ensuing criminal trial.*" (Emphasis ours.)

CONCLUSION.

Some restraints must be imposed on the willingness of the Internal Revenue Service to sacrifice the constitutional rights of tax payers in the name of collecting public revenue. The willingness of the govern-

ment here in this very case to use the pretext that it is solely concerned with civil liability for taxes in the face of the admitted fact that it is using a criminal law enforcement officer to conduct the investigation is, in itself, the best evidence that this Court should speak definitively on the issues implicit in this appeal. It is neither good morality nor good law for the government to maintain the fiction of a civil determination as to possible taxes due while, at the same time, using a criminal law enforcement officer in the investigation.

In any event, the questions presented are substantial and require action by this court. These questions are of increasing concern to the lower courts and this Court itself is being increasingly burdened by applications for review of pronouncements of lower courts on these subjects. We respectfully submit that an expression of authoritative opinion by this Court will be of great value to the lower courts in adjusting the interplay between constitutional rights and the rights of the government to protect the public revenue.

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